SUPREME COURT, U. S.

FILED

DEC 29 1967

JOHN F. DAVIS, CLERK

Nos. 178 & 179.

IN THE

Supreme Court of the United States

October Term, 1967

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR UNITED INSURANCE COMPANY OF AMERICA.

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NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR UNITED INSURANCE COMPANY OF AMERICA.

COUNTERSTATEMENT OF THE QUESTION PRESENTED.

By a 1947 amendment to Section 2(3) of the National Labor Relations Act (29 U. S. C. 152(3)), Congress mandated that the distinction between independent contractor and employe under the Act was to be determined by reference to the general principles of the law of agency. The question here presented is whether the Court of Appeals correctly concluded, under the controlling principles and on the basis of an evaluation of the record as a whole, that the debit agents of United Insurance Company of America were independent contractors and that the National Labor Relations Board had erred in finding to the contrary.

COUNTERSTATEMENT OF THE CASE.

United Insurance Company of America (hereinafter called "United") is an Illinois corporation, founded in 1919, which writes commercial and industrial life, health and accident, and hospitalization insurance. The "debit agents" of this case contract with United to sell and service the policies on a commission basis. Continuously since 1953, the Insurance Workers International Union, AFL-CIO (hereinafter called the "Union"), has sought to represent these agents for purposes of collective bargaining, alleging that the agents are not independent contractors but rather, employes within the meaning of Section 2(3) of the National Labor Relations Act (hereinafter called the "Act" or the "Labor Act"), as amended, 29 U. S. C. §§ 141 *et seq.* United has consistently maintained, throughout the several proceedings initiated by the union, that its debit agents are *bona fide* independent contractors. This issue as to the status of United's debit agents has been presented to the United States Court of Appeals for the Seventh Circuit on three occasions within the past eight years.

On the first occasion, the Court of Appeals reviewed an order of the National Labor Relations Board (hereinafter called the "Board"), which required United to bargain with the Union as the representative of United's debit agents in Pennsylvania. Enforcement was refused on the ground that United had been denied procedural due process in the proceeding before the Board. The Court remanded the case to the Board "* * * for a full hearing and decision based upon a consideration of all relevant evidence * * *". **United Insurance Company of America v. N. L. R. B.**, 272 F. 2d 446, 449 (C. A. 7, 1959).

After the proceeding on remand, the Board again ordered United to bargain with the Union as the repre-

sentative of the Pennsylvania agents. When the matter came before the Court of Appeals for the second time, that Court squarely met the basic issue of the independent contractor or employe status of United's debit agents and refused to enforce the Board's order, on the ground that United's debit agents were independent contractors within the meaning of the Act. The Court concluded that "* * * United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do.* * *" **United Insurance Company of America v. N. L. R. B.**, 304 F. 2d 86, 91 (C. A. 7, 1962). Neither the Board nor the intervenor Union sought review of this decision by this Court.

The present case is the third occasion on which the court below has considered the nature of United's operation. Here, the area involved is Baltimore City and Anne Arundel County, Maryland. The Board, after hearing, again ordered United to bargain with the Union as the representative of United's agents in that area. The court below, on review, again concluded that United's debit agents are independent contractors. **United Insurance Company of America v. N. L. R. B.**, 371 F. 2d 316 (C. A. 7, 1966); (A. 1231-1243).[1]

Following the Court of Appeals 1962 decision, United entered into a reinsurance agreement in December, 1963, with Quaker City Life Insurance Company (hereinafter called "Quaker"), a Philadelphia, Pennsylvania corporation. Under the terms of the agreement, United agreed to

1. A fourth case involving this same issue and these same parties is presently pending before the same Court of Appeals awaiting the outcome of the present case. **(United Insurance Company of America v. N. L. R. B.** and **Insurance Workers International Union; AFL-CIO v. N. L. R. B.**, C. A. 7, Case Nos. 16,006 and 16,265.) A defense of prior adjudication, not technically available in the instant case since it involves a different territory, has been raised in this most recent case which, as in the 1962 case, involves United's Pennsylvania agents.

reinsure Quaker's outstanding policies in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland. Quaker had long maintained an employer-employe relationship with its debit agents, and such agents in Baltimore City and Anne Arundel County, Maryland, were represented by the Union. In March, 1964, when the reinsurance agreement became effective, Quaker terminated all of its employes including its debit agents in Baltimore City and Anne Arundel County, Maryland. Shortly thereafter, many of these former Quaker agents applied for and were granted independent agencies by United.[2]

Seventy-nine of the one hundred fifty-nine agents in the territory were former Quaker agents and were members of the Union. The Union, defeated in its earlier attempts to establish that United's agents were employes within the meaning of the Act, immediately seized the opportunity presented by this situation. Within three months of the effective date of the United-Quaker reinsurance agreement, the Union petitioned the Board for certification as the exclusive bargaining representative of all of United's agents in Baltimore City and Anne Arundel County, Maryland.

Following the procedure used in the Pennsylvania case, United and the Union entered into a stipulation for certification upon consent election. Paragraph 13 of the stipulation expressly reserved to United the right to raise the issue of the independent contractor status of its agents in any subsequent unfair labor practice proceeding initiated by the Union (A. 1047). Upon the Board's certification of the Union in August, 1964, United rejected the Union's re-

2. This case does not involve any question of the rights and obligations of a successor employer. That issue was raised by the Union in a separate proceeding which it instituted in January, 1964, in the United States District Court for the District of Columbia (Civil Action No. 57-64). The Union's complaint in that case was dismissed with prejudice by stipulation of the parties in March, 1966.

quest for bargaining on the ground that its agents were independent contractors within the purview of the Act. Thereupon, the Union instituted unfair labor practice proceedings, charging United with violating Section 8(a)(1) and (5) of the Act.

At the hearings conducted by the Board in December, 1964 on the Union's charges, General Counsel for the Board introduced the testimony of only two witnesses, both members of the Union and former Quaker agents. United presented the testimony of four debit agents, with from one to six years of experience as United agents, and the stipulated testimony of six additional agents. United also introduced the testimony of its General Counsel and Vice President, its Agency Vice President, and the Divisional Manager, whose division included Baltimore City and Anne Arundel County, Maryland.

In May, 1965, the Trial Examiner issued his decision and recommended order (A. 1122-1183). He indicated that he was not bound by the findings made in 1962 by the Court of Appeals (A. 997-998) and made contrary findings as to the nature of United's operation. In support of his conclusion that United's debit agents in Baltimore City and Anne Arundel County, Maryland were employes within the meaning of the Act, the Trial Examiner expressly relied, *inter alia,* upon his personal observations of off-the-stand demeanor allegedly exhibited in the hearing room by United's agents, including those who testified and those who did not (A. 1151-1152):

> "* * * [W]ithout exception the agents did not display or appear to have attributes of independence * * * but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard. * * *
>
> * * *

> "* * * I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties."

In July, 1965, the Board affirmed and adopted as its own the Trial Examiner's findings, conclusions and recommendations, and ordered United to bargain with the Union as the representative of its agents in Baltimore City and Anne Arundel County, Maryland (A. 1199-1200). In adopting the Examiner's ultimate conclusion, the Board disavowed reliance upon the Examiner's "observation * * * that the demeanor of the debit agents toward admitted supervisors during the hearing was one indicating an employer-employee relationship." (A. 1200).

Both United and the Union filed petitions for review of the Board's order (A. 1201-1203, 1206-1209). These petitions, together with the Board's answer and cross-petition for enforcement of its order (A. 1204-1205, 1209-1210), were argued before the Court of Appeals in November, 1966. The decision of the Court of Appeals, setting aside the Board's order, was issued on December 21, 1966 (A. 1231-1244). Upon a careful examination of the entire record, the Court of Appeals concluded that there was "* * * no support in the record for some of [the Board's] findings and but tenuous support for others. * * *" (A. 1239). This Court granted the petitions for writs of certiorari of the Board (No. 178) and the Union (No. 179) on October 9, 1967 (A. 1245-1246).

SUMMARY OF ARGUMENT.

I.

On two occasions, the Court of Appeals for the Seventh Circuit has concluded, after a full examination of all facts of record, that United conducts its business through agents who are independent contractors, not employes. This conclusion has been reached by applying to the facts the test specifically established by Congress in 1947, directing that the distinction between employe and independent contractor for the purpose of the National Labor Relations Act be resolved by application of the principles of the law of agency. The action of Congress in 1947, in prescribing this specific test for determining status, was a direct repudiation of the earlier practice of the Board, sanctioned by this Court in the **Hearst** decision in 1944, of determining status on the basis of economic and policy considerations.

Since 1947, the courts, under the amendment provided by Taft-Hartley and under comparable provisions of the Social Security Act, have applied the familiar control test of the law of agency. Each case has been resolved on its own facts and the decisive question has been whether control was exercised over the manner and means of the occupation in question.

The Board, while bound to recognize the test imposed by Congress, has never, in reality, abandoned the position that it alone should determine the question of status on the basis of policy considerations within its own special field of activity. As a result, the Board has persistently attempted to classify different groups as "employees" on the basis of economic considerations which, in the Board's view, justify that classification, rather than on the objective application of the control test to the facts of each case. It

is this determination to classify occupations rather than to apply the agency law test to each case which accounts for the fact that United has been forced to explain and defend its operation continuously over a period of fourteen years. Throughout this extended period, United has shown again and again, that its operation, substantially the same in nature since the founding of the company in 1919, has been carried out through independent agents, that this method of operation has been a deliberate choice by United and that the method is not necessarily one employed by companies engaged in comparable lines of insurance business.

A fair and objective reading of all the facts of record establishes that, under the control test prescribed by Congress, United's agents are independent contractors. The facts which support this conclusion and upon which the court below relied are set forth and discussed in detail in the course of our argument, *infra*. Item by item, these facts establish that United is interested only in results and that United's agents, while they may obtain some assistance from the company if they desire, operate on their own in all significant respects.

II.

Before this Court, the Board cannot very well level a direct challenge to the test of status which Congress has imposed. However, the Board attempts to achieve the same result by means of an argument as to the function of the reviewing court which would, in substance, restore the Board to the position it occupied prior to the 1947 amendment.

The 1947 amendments to the National Labor Relations Act included a substantial change in the review provision of that Act, a change which was examined and given definition by this Court in the **Universal Camera** case in 1951.

In **Universal Camera**, this Court questioned whether it had ever been proper for a reviewing court to test an administrative order solely on the basis of the evidence which might support the order, and pointed out that, under the changed review provision of the National Labor Relations Act, as under the review provision of the Administrative Procedure Act, the reviewing court was assigned an important function which could be discharged only by an evaluation of all the evidence of record.

We submit that the Board's approach is wrong and that the court below possessed both the power and duty to evaluate the record as a whole. Of equal importance is the fact that the ultimate conclusion to be drawn from this evaluation involves the application of a test drawn from the law of agency as to which the court was at least as fully experienced as the Board. Even during the period when the role of a reviewing court was limited most narrowly, this Court recognized a broader authority where the resolution of the question for determination turned on the application of a familiar principle of law.

The court below, both in this case and in the earlier case involving the same question, carefully evaluated the record as a whole in coming to the conclusion that United's agents are independent contractors. This evaluation not only led the court below to confirm the result reached in its earlier consideration of United's operation but also impelled the court here to hold that the record was "* * * tainted with a flavor which precludes [the court] from conscientiously relying upon it as adequately supporting the Board's determination and order." (A. 1243).

III.

The Trial Examiner relied exclusively on testimony given by former Quaker employes who reported to Frank-

lin Street, a former Quaker location in Baltimore. He ignored or discounted the uniform testimony of old line United agents who reported to United's long established St. Paul Street office in Baltimore. He also ignored or discounted the effect of the confusion in procedure during the period following the execution of the United-Quaker reinsurance agreement. In this circumstance, the Board erred in ordering United to bargain with all of its agents in Baltimore City and Anne Arundel County, Maryland, basing the order on the Franklin Street testimony only. The unit involved was composed, at worst, half of employes and half of independent contractors.

Argument.

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER THE CONTROLLING PRINCIPLE OF LAW, UNITED'S DEBIT AGENTS ARE INDEPENDENT CONTRACTORS AND NOT EMPLOYES WITHIN THE MEANING OF THE ACT.

The basic argument of the National Labor Relations Board in this case was foreshadowed by the presentation made in the Board's petition for certiorari. There, the Board argued that a ruling in this case is important "* * * to all insurance agents, and, beyond that, to the countless individuals who, although they work for a single company under the company's direction and control, do so for the most part 'on their own'—a class that includes, for example, traveling salesmen, collection agents, newsboys and milkmen. * * *" (Pet., p. 12).[3]

Lines of argument, raising questions as to the appropriate scope of review, are also advanced by the Board in its brief on the merits here. But such arguments, on analysis, are merely alternative paths to the one basic position urged by the Board. In essence, the Board has here advanced a test whereby overriding policy considerations —the Board's view of the position in the economy of the particular group involved—are to be given controlling effect in determining whether United's agents are independent contractors or employes. In substance, this is no

3. The petition for certiorari filed by the Union is to the same effect, stating that "* * * the grounds upon which the decision rests are not and cannot be confined to this particular employer or this particular record.* * *" (Pet., p. 11).

more than a reassertion of the position taken by the Board on the issue of employe status prior to the 1947 amendment of Section 2(3) of the Act.

We submit that this position of the Board is incorrect. We do not argue that the general purposes of the Act are to be put aside and a case involving the issue of employe status decided as though it arose at common law. We do argue that Congress has categorically rejected the view now urged upon this Court by the Board. The statutory standard for resolving the question whether status is that of an independent contractor or employe must be given full recognition. A case which involves that issue cannot be made to turn on categories of employment as determined by the Board. Thus, as the Court of Appeals properly recognized, the resolution of the issue of status in this case does not determine the question of status as it might arise in cases involving other insurance companies, let alone "* * * travelling salesmen, collection agents, newsboys and milkmen. * * *".

The only explanation for the long assault on United's operation is, we submit, the Board's determination that it should have the power, on the basis of those considerations which it deems most important, to fix categories of employment for the purpose of coverage under the Act. But this is the very power which Congress has denied to the Board. On two occasions the Court of Appeals, by application of the appropriate statutory standard, has correctly held that the Board erred in concluding that United's agents are employes within the meaning of Section 2(3) of the Act.

A. The Controlling Principle of Law.

In **N. L. R. B. v. Hearst Publications, Inc.**, 322 U. S. 111 (1944), this Court rejected the contention that "common law standards" governed the distinction between "em-

ployees" and "independent contractors" under the Act and held that "Whether * * * the term 'employee' includes [particular] workers * * * must be answered primarily from the history, terms and purposes of the legislation. * * *" 322 U. S. at 124. This Court stated that (322 U. S. at 124, 126, 129):

> "* * * Congress had in mind a wider field than the narrow technical legal relation of 'master and servant' * * *. The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors'. * * * [T]he broad language of the Act's definitions which in terms reject conventional limitations on such conceptions as 'employee', * * * leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications. * * *"

Congressional reaction to this construction of the Act was adverse. Accordingly, Congress amended the Act specifically to exclude "any individual having the status of an independent contractor" from the definition of "employee" contained in Section 2(3) of the Act and directed the Board and the Courts thenceforth to apply "the general principles of the law of agency"[4] in distinguishing between employes and independent contractors under the Act. The House Committee Report on the bill stated:

> "* * * It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now,

4. 93 **Congressional Record**, p. 6599 (June 5, 1947).

that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'. . . ." H. Rep. No. 245, 80th Cong., 1st Sess., p. 18.[5]

Senator Taft stated that the "* * * legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency. * * *".[6]

In **Boire v. Greyhound Corp.**, 376 U. S. 473, 481, n. 10 (1964), this Court observed that the "* * * effect of this provision was to overrule *Labor Board v. Hearst Publications,* 322 U. S. 111. * * *" Although this Court there referred, in passing, to the common law test of "control" determinative of employe or independent contractor status under the Act, this Court has not had occasion, since the amendment of 1947, to review a case involving that amendment.[7] However, the issue of employe or independent contractor status under the amendment has been presented to the various courts of appeals on several occasions. And the courts of appeals have uniformly held, in these cases, that "* * * [c]ommon law tests are to be used to distinguish between the two. * * *"[8] While due regard must be had for the purposes of the Act, nevertheless agency principles

5. See also, H. Rep. 510, 80th Cong., 1st Sess., pp. 32-33.

6. See footnote 4, *supra.*

7. **N. L. R. B. v. E. C. Atkins & Co.**, 331 U. S. 398 (1947), upon which the Board places reliance (Br., p. 29), was decided before the Act was amended.

8. **N. L. R. B. v. A. S. Abell Co.**, 327 F. 2d 1, 4 (C. A. 4, 1964) and cases cited therein.

constitute the controlling test in distinguishing between employes and independent contractors under the Act.[9] A reading of this Court's decision in **N. L. R. B. v. Hearst Publications,** *supra,* coupled with the resulting Congressional amendment and its legislative history, clearly demonstrates this to be the correct approach.[10]

Both the Board and the Union rely upon decisions of this Court, interpreting the term "employee" under the Fair Labor Standards Act and the Social Security Act, as enunciating the proper standard of law to be applied in determining employe status under the Labor Act (Board's Brief, p. 18; Union's Brief, pp. 53-54). The Fair Labor Standards Act decisions are not pertinent. The Social Security Act decisions fully support United's position here.

The most recent decision of this Court, under the Fair Labor Standards Act, **Goldberg v. Whitaker House Cooperative, Inc.,** 366 U. S. 28, 33 (1961), concludes that "* * * the 'economic reality' rather than 'technical concepts' is to be the test of employment * * *" under that Act. United has no quarrel with the application of such a test under the Fair Labor Standards Act. In that Act, Congress neither expressly directed that the general principles of the law of agency should be the controlling criteria in determining employe status under that Act nor saw fit to amend the Act so as specifically to exclude "independent contractors". Indeed, the definition of "employee" contained in the Fair Labor Standards Act has been described as "* * * the broadest definition that has ever been in-

9. See, *e.g.,* **Continental Bus System, Inc. v. N. L. R. B.,** 325 F. 2d 267, 271 (C. A. 10, 1963) and cases cited therein.

10. As to the Board's view, see p. 19, *infra,* ftn. 14. The Union candidly contends that the purposes of the Act remain the primary consideration while the common law test is no more than an additional consideration. United submits that this is just another way of stating the test enunciated in **Hearst** and rejected by Congress. See Un. Br., p. 52.

cluded in any one act." **United States v. Rosenwasser,** 323 U. S. 360, 363, n. 3 (1945).

The test to be used in determining employe status under the Labor Act and the Social Security Act is plainly more restrictive. In 1948, Congress amended the Social Security Act to provide that the term "employee" "* * * does not include (1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor * * *".[11] Prior to Congressional amendment of that Act, this Court had held that the policy and purposes of the Act, rather than common law standards, constituted the primary consideration in determining the existence of the employment relationship. **United States v. Silk,** 331 U. S. 704 (1947); **Bartels v. Birmingham,** 332 U. S. 126 (1947). This is, of course, the same test as was enunciated by this Court in **N. L. R. B. v. Hearst Publications,** *supra.* The 1948 amendment of the Social Security Act was intended to have the same effect as the 1947 amendment of the Labor Act.[12] Each amendment was intended to override this Court's reliance upon the "economic reality" test and to reestablish the primacy of the agency law test of "right of control" in determining employe status.

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11. 26 U. S. C. § 1426(d). This provision, as further amended in 1950, now appears at 26 U.S.C. §.3121(d) and provides, in pertinent part, that: "* * * the term employee means * * * any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or * * * (3) any individual * * * who performs services for remuneration for any person * * * (B) as a full-time life insurance salesman * * *". The specific reference to insurance salesmen, in defining "employee", was thought necessary on the ground that, under the common law test, such salesmen would not be considered to be employes. H. Rep. 1300, 81st Cong., 1st Sess., pp. 14-15. 26 U. S. C. 1607(i), which now appears at 26 U. S. C. § 3306(i), defining "employee" under the Federal Unemployment Tax Act, is identical in language with the former 26 U. S. C. § 1426(d).

12. See S. Rep. 1255, 80th Cong., 2d Sess.; H. Rep. 1319, 80th Cong., 2d Sess.

In **Enochs v. Williams Packing Co.**, 370 U. S. 1, 3 (1962), this Court stated that Congress "* * * specifically adopt[ed] the common-law test for ascertaining the existence of the employer-employee relationship * * *" under the Social Security Act. The federal courts have explained that

> "* * * Congress regarded the broadening scope of the term 'employee', as contained both in the Social Security Act and in the Labor Act, as an usurpation by the courts and the administrative agencies of the Congressional legislative function. * * * Congress intended to and did materially limit the term 'employee' as it had been construed and applied by the administrative agencies and the courts. It established in plain and certain terms that the common law test and that only was to be applied, and again and again in the committee reports it is stated that the common law rules to be invoked must be 'realistically applied'." **Party Cab Co. v. United States**, 172 F. 2d 87, 91 (C. A. 7, 1949).[13]

The identically worded amendment of the Labor Act in 1947 likewise requires that common law principles, realis-

13. See also, **Millard's, Inc. v. United States**, 146 F. Supp. 385, 388 (D. N. J., 1956) "* * * it must be considered settled law 'that the usual common law rules, realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act * * *'."; **Rayhill v. United States**, 364 F. 2d 347 (Court of Claims, 1966); **Lifetime Siding, Inc. v. United States**, 359 F. 2d 657 (C. A. 2, 1966); **Benson v. Social Security Board**, 172 F. 2d 682 (C. A. 10, 1949); **Ewing v. Vaughan**, 169 F. 2d 837 (C. A. 4, 1948); **Titanium Ores Corp. v. United States**, 205 F. Supp. 606 (D. Md., 1962); **Metropolitan Roofing and Modernizing Co. v. United States**, 125 F. Supp. 670 (D. Mass., 1954); **Levin v. Manning**, 124 F. Supp. 192 (D. N. J., 1952). But see **Hoosier Home Improvement Co. v. United States**, 350 F. 2d 640 (C. A. 7, 1965) and **Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins**, 189 F. 2d 865 (C. A. 2, 1951).

tically applied, be the controlling test in determining employe or independent contractor status under the Labor Act.

The common law test for determining the existence of the employment relationship was succinctly stated by this Court long ago in **Singer Manufacturing Co. v. Rahn**, 132 U. S. 518, 523 (1889):

> "* * * the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' *Railroad Co. v. Hanning*, 15 Wall. 649, 656." [14]

In this case, the Court of Appeals, quoting from its 1962 decision involving United's debit agents, stated (A. 1235):

> "* * * that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * * the critical

14. As we have pointed out, this Court has noted, both as to the 1947 amendment to the Labor Act and the 1948 amendment to the Social Security Act, that the distinction between individual contractor and employe status was to be resolved by the common law test of control. pp. 17-18, *supra*. The Board, while seemingly accepting the 1947 amendment to the Labor Act, attempts to construe its scope so as to broaden its coverage beyond the familiar common law test. Thus, the Board infers that the control test, developed in the law of torts, is only appropriate for the determination of coverage under the Labor Act if it be complemented by what the Board calls "* * * the subsequent infusion of flexibility * * *" (Br., p. 17, ftn. 18). No authority is cited by the Board in support of this variation of the statutory test.

distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. * * *"

In determining whether the requisite control of manner and means is present or absent, various factors must be examined, *e.g.*, the right to hire and discharge, the method of payment, who furnishes the tools and materials used, who designates the time and place for the work to be done, and the intention of the parties. The **Restatement of the Law, Agency 2d**, Section 220, pp. 485-486 (1958), states that other factors, such as the extent of control over details permitted the master by the agreement, the nature and duration of the work, the skill required in the work, and the business of the principal, should also be considered "in determining whether one acting for another is a servant or an independent contractor".[15]

Close examination of its decision reveals that the Board did not, in fact, apply the control test as decisive but rather substituted its "rule of thumb" that debit agents, as a group or occupational class, are of necessity employes. See pp. 23-24, *infra*. The Board's affinity for this "rule" is well documented. The Board has never, in a single case, held debit agents, or for that matter any insurance agents, to be independent contractors rather than employees.[16] So

15. Section 220 of the Restatement, pp. 487-488, states "* * * The important distinction [between a servant and an independent contractor] is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results * * *. Those rendering service but retaining control over the manner of doing it are not servants * * *."

16. See, *e.g.*, **Farmer Insurance Group**, 143 NLRB 240 (1963); **Provident Life & Accident Insurance Co.**, 118 NLRB 412 (1957); **Allstate Insurance Co.**, 109 NLRB 578 (1954); **Golden State Agency**, 101 NLRB 1775 (1952).

certain is the Board of the employe status of all debit and other insurance agents that it "* * * has fashioned general principles of appropriate bargaining unit determination applicable to such agents. * * *" (Un. Br., p. 60). Clearly, such an approach is not in keeping with the test laid down by Congress for determining employe status under the Act.

The Board's reluctance to accept the control test, in determining employe or independent contractor status in contexts other than debit or other insurance agents, has resulted in several reversals of Board findings of employe status within recent years. See, *e.g.*; **N. L. R. B. v. A. S. Abell Co.**, 327 F. 2d 1 (C. A. 4, 1964) (newspaper carriers); **Frito-Lay, Inc. v. N. L. R. B.**, 66 **LRRM** 2542 (C. A. 7, 1967) (route distributors); **National Van Lines, Inc. v. N. L. R. B.**, 273 F. 2d 402 (C. A. 7, 1960) (contract-drivers); **Site Oil Co. of Missouri v. N. L. R. B.**, 319 F. 2d 86 (C. A. 8, 1963) (lessees of service stations); **N. L. R. B. v. Servette, Inc.**, 313 F. 2d 67 (C. A. 9, 1962) (driver-salesmen); **Continental Bus System, Inc. v. N. L. R. B.**, 325 F. 2d 267 (C. A. 10, 1963) (operator of bus terminal). In each of these cases, as here, the Board's decision was framed in terms of "control"; but in each of these decisions, as here, the Board failed realistically to apply the test it routinely purported to follow.[17]

Here, the Board gave weight only to those factors which, in its opinion, indicated that the requisite right of control might have existed.

The many factors, which plainly indicated that the requisite right of control did not in fact exist, were explained away as merely evidencing a failure by United to exercise a reserved right to control. Such "boot-strap" reasoning,

17. See also, **San Antonio Light Division, The Hearst Corporation**, 167 NLRB No. 99, 66 LRRM 1131 (1967), a very recent Board decision which purports to apply the control test but plainly does not.

designed to achieve a preordained result, is hardly an appropriate substitute for a just and impartial appraisal of all the facts of record. The Board's use of such a one-sided approach has twice been rejected by the Court of Appeals upon its review of the record. In each case, the Court of Appeals observed that the conclusion as to employe or independent contractor status under the Act "* * * must be based on the 'total situation' looking at all of the facts in the particular case." (A. 1235).

All debit agents are not, simply by virtue of their being debit agents, employes within the meaning of the Act. Nor, admittedly, are all debit agents independent contractors. While the very nature of certain activities compels the conclusion that those engaged in them are employes, United submits that there are many others—and the selling of insurance is one of them[18]—in which management may make a genuine choice as to the manner in which they are to be conducted. The management of an insurance company may, as in **N. L. R. B. v. Phoenix Mutual Life Ins. Co.**, 167 F. 2d 983, 987 (C. A. 7, 1948), choose to conduct its business by exercising close control over every detail of its salesmen's work with the result that such salesmen are placed "* * * in a somewhat different class than ordinary insurance salesman * * *". On the other hand, the management of an insurance company may, as here, choose to operate its business through independent contractors "* * * and, of course, it had the complete legal right so to do" (A. 1235).

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18. For other such businesses, see **Site Oil Co. of Missouri v. N. L. R. B.**, 319 F. 2d 86, 93 (C. A. 8, 1963) (lessees of service stations); **N. L. R. B. v. Servette, Inc.**, 313 F. 2d 67, 71 (C. A. 9, 1962) (driver-salesmen); **International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N. L. R. B.**, 280 F. 2d 665, 666 (C. A. D. C. 1960) (driver-salesmen).

A fair and objective application of the control test to the facts of the present case readily demonstrates, as the Court of Appeals correctly concluded, that United's debit agents are independent contractors and not employes within the meaning of the Act.

B. The Facts.

1. *The Agents Are "On Their Own".* They set their own hours of work and their own workdays; they make their own arrangements with policyholders respecting the frequency of premium payments and they select their own methods as to collection of premiums and solicitation of new business (A. 238-239, 342-343, 372-373, 398-399, 402-403, 408-409, 415, 448-500, 518-519, 835-836). General Counsel for the Board conceded that these facts are true (A. 833-834).

The agents are not told what policies to sell or what prospects to call on for new business (A. 178-181, 192-194). The agents have no quota to meet (A. 286). They are not told where to seek new business, nor does United give them any leads (A. 698).

2. *The Agents Are Not Assigned "Territories".* There is no geographical limitation or boundary imposed by a debit book.[19] The areas represented in various debit books may and do overlap (A. 216-219, 695-696, 816-817, 834). United does not make a calculated effort to arrange a debit so that the agent is working in a given geographical area, but some agents do so themselves by voluntarily transferring policyholders to other agents, as when a debit area becomes so widespread that, in the opinion of the

19. A "debit book" contains the names and addresses of, and data concerning, policyholders serviced by an agent. The term "debit" is sometimes used to refer to the area embraced by the addresses contained in the book at any given time.

agent, it becomes difficult to service. This transfer of policyholders from one agent to another is done by the agents, for their own convenience, and without any restriction or limitation by United (A. 251, 255-256, 259-262, 307-308, 312-315, 511-513, 697-698, 715-718, 839-840).

The General Counsel's principal witness, Chairman of the Union Local (A. 255),[20] testified with respect to three isolated incidents in which policy transfers were not effectuated; each incident involved former Quaker agents at the former Quaker location in Baltimore, during the confusion of the first weeks following the effective date of the United-Quaker reinsurance agreement. At most, these occurrences constitute the rare exceptions to an established rule reflected in hundreds of other cases (A. 249-251, 359-362, 512-513). On cross-examination, even General Counsel's principal witness admitted that fifty-five policies were routinely transferred to him by other agents during his preparation for this case. He further conceded that he had freely transferred "dozens" of policies since becoming an agent for United (A. 251, 312-315).

3. *The Agents May Solicit Anywhere.* The agents are free to solicit and obtain business anywhere, subject only to the limitations imposed by the insurance laws of Maryland (see, *e.g.*, Ann. Code of Md., Art. 48A § 167; A. 217, 411, 693-697). In Maryland, as in most states, an agent must be licensed to sell insurance and the license covers

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20. The Board and the Union rely almost exclusively upon the testimony of this one witness (Scott). The only other witness called by the Board, also an active member of the Union and a former Quaker agent, testified only very briefly. "* * * [T]his particular record makes clear that the Quaker City agents, who had acted together as a Union before [United] took over, * * * continued to do so thereafter * * * [with] [a]gent Scott * * * as the collective spokesman * * *" (Un. Br., p. 41).

specific types of insurance for a specific company (Ann. Code of Md., Art. 48A § 166a; A. 880).

4. *The Agents Are Required to Pay Their Own Business Expenses.* The agents are required to pay their own expenses, such as transportation, advertising, business cards, postage, and gifts or favors for policyholders or prospects (Ex. R. 2; A. 230-233, 431-432, 507-508, 540, 617-618, 706-709, 757-761, 835, 851-852, 1114). The fact that brochures describing United's policies and, infrequently calendars and matchbooks, are available to the agents, if they wish to use them, is obviously of little significance (A. 113-120, 747-748). Similarly, the fact that when, as relatively infrequently occurs, a policy holder mails his premium, together with his premium receipt book, in to the district office, the district office, in order to accommodate the policyholder, returns the premium receipt book to the policyholder at Company expense, is of little or no significance (A. 97-98, 725). Where an agent's debit requires him to cover a large, outlying area, he may receive an additional one percent commission on collections. However, this additional one percent commission varies from week to week with the amount of the agent's collections, not with travel expenses, and therefore plainly constitutes additional commission and not reimbursement for travel expenses (A. 375, 409-410, 519-520, 617).

5. *The Agents Report Only Results.* Agents are not required to make any specific number of collection calls per day or per week, nor to report to United the number of collection calls they do make (A. 699-702). They are not required to make any specific number of new business calls per day or per week, nor to report to United the number of such calls they make (A. 731). The agents are not required to report the number of hours worked, the number of days worked, or the specific days in the week worked or not

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worked. General Counsel for the Board conceded that all of this is true (A. 840).

The reporting forms used by the agents (Agent's Weekly Account, Ex. GC 10, A. 1060-1061 and Abstract of Agent's Weekly Report, Ex. GC 12, A. 1064) plainly demonstrate that the agents report only results and not the manner and means by which their results are achieved. The reports are necessary to keep United informed of its insurance obligations, the amount of premium due, and the amount of commission earned by the agent (A. 419-421). Reports of lapsed policies and certain insurance applications are filed with United for the same reason (A. 81-85, 93-94). United offered to show that, where its policies are sold through large general agency organizations, virtually identical reports are filed (A. 672-682). As the Court of Appeals noted in the 1962 case, the "* * * reports mentioned by the Examiner are no more significant than would be the situation where a manufacturer requires reports from its manufacturers' representative." (304 F. 2d 86, 90).

United requests the agents to report their results to the district offices by Thursday or Friday of each week because those offices must themselves report by the following Monday or Tuesday. However, the agents may report on any day they choose and may do so by mail if they wish (A. 449-451, 505-506, 842-845, 856-857). The testimony of General Counsel's witness Scott that United instructed him to report to his district office each Thursday morning at 8:30 A. M. was placed in proper perspective when he was forced to admit that the only "instruction" he had reference to occurred in the course of a private conversation with his district manager a few days after both he and his district manager had come to United from Quaker (A. 202-208). Finally, some agents go to the district office from time to time in order to check the "life register"

and pick up "office pays" and new policies, but this is not required (A. 61-63, 236-237, 318-320, 422-423).

6. *The Agents Are Free to Engage in Additional Occupations.* The agents may engage in additional occupations including the sale of competing companies' insurance policies (A. 410, 705, 864). General Counsel's witness Scott admitted on cross-examination that, after becoming an agent for United, he had sold a quarter of a million dollars worth of life insurance for another company (A. 189-191, 291-292).

7. *The Agents May Set Up Their Own Offices and Hire Their Own Assistants.* The agents may, if they desire, set up offices in their homes, or elsewhere, and may hire assistants, at their own expense, to aid in collecting premiums (A. 410, 708-710, 759-760, 866-867). Many agents use rooms in their homes either exclusively or partially as offices. There, they have desks, phones, sometimes typewriters, adding machines, files, stationery, etc. The cost of the maintenance of such facilities, and also all the various business expenses personally incurred by the agents, are deducted as business expenses by the agents in their income tax returns (A. 230-232, 725, 866-867). The Board's finding that an agent may not "hire an unlicensed person to make collections for him" (A. 1140) confuses collection of premiums, for which no license is required, with sales of insurance, for which the State requires a license whether one sells on his own behalf or on behalf of another (A. 456-457). The Board's finding that, in any event, freedom to hire assistants to aid in collecting premiums does not support "* * * the claim of independent status" (A. 1140) is patently erroneous under general principles of agency law.

8. *The Agents Do Not Have Free Use of District Office Facilities.* United does not supply its agents with

"rent", "office space", or "telephones". United permits its agents to use the facilities of its district offices, including desk space if available, for preparing reports, but does not permit the agents to use these facilities for the general conduct of their business (A. 298-299). United's district offices are necessary as centers to receive reports; any other use of them by the agents is incidental and minimal (A. 458-459, 873). General Counsel's witness Scott was compelled to admit that he did not even have a key to the district office (A. 121); that the tables and chairs in the district office were for common use by anyone (A. 298-299); that he spent only three to four hours per week in the district office (A. 318); and that the only clerical help rendered the agents by district office employes was the occasional acceptance of a telephone message or the writing of a note (Ex. GC 26; A. 123, 300-302, 1097).

9. *The Agents Are Compensated Solely by Commissions.* The agents receive no salary, advance, or draw, but are compensated solely by commissions on premiums collected, on new business, and on increases in business and collections (A. 424-425, 429-430). An agent's commission with respect to existing and new policies is determined by a formula set forth in the "Agent's Commission Plan" (Ex. GC 6; A. 1051-1057). The amount of commission that an agent may earn depends on his industry and ambition (A. 195-199, 706, 746). The annual income of United's agents in Baltimore City and Anne Arundel County, Maryland ranges between $7,000 and $20,000 (A. 414).

10. *The Agents Receive Little Training or Assistance.* United's debit agents are engaged by district managers, who interview prospective agents. Each new agent executes a contract with United and is given a debit book (Ex. GC 6; A. 174, 194, 618, 696-697, 1051-1059). If a new agent has not had experience in selling insurance, United

explains the various policies which it has available, the rates and the reports filed with United, and frequently introduces the new agent to some of the existing policyholders (A. 459). If a new agent has had experience in the insurance field, United only explains the policies available, the rates, and the various report forms (A. 727, 855).

For administrative purposes, each agent is placed on the "staff" of an assistant manager. The agents may not be transferred from one "staff" to another without their consent (A. 417). The unconsented transfers testified to by General Counsel's witness Scott occurred shortly after United's execution of its reinsurance agreement with Quaker at a time when United was compelled to review its entire district office organization in Baltimore City and Anne Arundel County, Maryland (A. 366-371, 556).

When an agent does not produce desirable results, an assistant manager will offer to accompany the agent, but ordinarily does not do so without the agent's consent (A. 233-234, 309-310, 484-485, 516-518, 743-744). Assistant managers do not accompany agents on a regular basis (A. 460-461), nor are there any specific instructions to the assistant managers as to how they should attempt to aid the debit agents (A. 561-563). An assistant manager, if available, will service an agent's debit, when he is known to be absent or ill (A. 320, 427-428, 475-477, 656-657, 709-711). On the days when the agents submit their weekly reports to United, an assistant manager will frequently hold an informal meeting of the agents who are present to discuss their results and to suggest sales techniques (A. 522-523, 533). However, attendance at such informal meetings is not required, and United takes no action in the case of agents who elect not to participate (A. 703, 742-743, 865).

11. *The Agents Are Required Only to Produce Reasonable Results and to Report Them.* The contract of each

agent is terminable at will by either United or the agent (Ex. GC 6; A. 1058). Since the agent contracts to produce results, his agency may be terminated if he does not produce results to the extent that may reasonably be expected. Of course, an agency may also be terminated for embezzlement or for excessive shortages in accounts (A. 442-443, 568-569). United examines an agent's debit book only when a serious shortage or some "wrongdoing" is evident (A. 567-572). The agent's weekly collection reports are checked solely for arithmetical purposes, but the agents' right to take their net commissions out of their collections is not in any way dependent upon completion of such check (A. 54-55, 194-196, 481, 483). Obviously, in any case where an agent collects money and remits net to his principal, the principal has a right to an accounting. Particularly is this true here, where, because of the very lack of United's control over its agents, the facts are almost exclusively within the agents' knowledge. United offered to show that it also examines its general agencies' books which reflect the collection of premiums and retention of commissions by those organizations (A. 672-674, 687). In remitting the amount of his collections to United, the agent need not turn in cash; money orders and checks are accepted (A. 450-451). At least one agent has continually used his personal check for this purpose (A. 704). Collections, like the reports which accompany them, need not be personally brought to the district office; they may be mailed in by the agent (A. 451).

12. *The Agents Receive No Paid Vacations, Holidays or Sick Leave.* The agents receive no paid vacations, holidays, or sick leave (A. 427-428, 475-476, 709). The "Agent's Commission Plan" permits an agent to take time off, with compensation based upon results achieved by the agent over a prior period of time (Ex. CG 6; A. 475-477,

1053-1054). The agents decide themselves if and when they will take time off (A. 320, 710-711). If an agent takes time off and requests an assistant manager to service his debit for him in his absence, an assistant manager will do so if available (A. 475-477). When absent or ill, agents may, and some do, hire other persons to service their debits (A. 410, 565-567, 788).

13. *The Agents Bear the Risk of Loss.* United does not reimburse its agents for bond premiums. The agents bear the risk of financial loss with respect to "hold-up" shortages (Ex. R. 1, 3, 4; A. 311-312, 430-431, 580-581, 1113-1116). In addition, the agents are responsible for unpaid premiums on lapsed policies in accordance with the terms of the "Agent's Commission Plan" (A. 143-146).

14. *The Agents Are Subject to No Payroll Deductions.* United does not withhold federal, state, or local income taxes, or payments for pension, welfare, or group life insurance from commissions earned by the agents. If an agent does not wish any of these items to be handled through United, they are not. However, as an accommodation to an agent, United will, at the agent's request, accept payments from the agents for these items, and with respect to income taxes, accumulate and, at the appropriate time, transmit such moneys to the tax authorities (A. 546-553, 704-705, 839, 889-890). Participation in United's group insurance and profit-sharing pension plans is on a strictly voluntary basis and United and the individual agent contribute equally to these plans (Ex. GC 36; A. 71-73, 546-552, 711, 890-891, 1098-1104).

The agents qualify for participation in United's profit-sharing pension plan as independent contractors under Section 7701(a)(20) of the Internal Revenue Code. Under this Section, the term "employe" is defined to include all full-

time life insurance salesmen whether they be employes or independent contractors. An identical provision is found in Section 3121(d)(3)(B) of the Internal Revenue Code requiring Social Security deposits for all full-time life insurance salesmen whether they be employes or independent contractors. Pursuant to this requirement, and only because of it, United contributes its share of the Social Security tax on behalf of its insurance agents. The individual agent's share of this tax is remitted by each agent to United (A. 69-70, 884-889). However, United does not pay unemployment compensation taxes or provide workmen's compensation for the agents, since in these instances, payments are required only with respect to employes (A. 890, 903-904).

15. *The Agents Are Not Required to Use United's Business Forms.* United furnishes the agents with various business forms, but the agents have freedom of choice as to whether to use these forms (A. 282-291), except for the weekly report forms. Only here are agents required to use the company's forms (A. 419-421). Clearly, a requirement by a national company that its agents report results in a uniform manner does not indicate any significant amount of control over the agents' manner and means of conducting their business. Uniformity of report forms results solely from size and a desire for efficiency, and has no relevance to the determination of the existence *vel non* of the employment relationship.

16. *The Agents Are Free to Advertise and Process and Pay Claims.* Materials advertising United's insurance policies are supplied to the agents because the law of Maryland, as well as federal law with respect to false advertising, imposes penalties on the Company for misleading insurance advertisements (Ann. Code of Md., Art. 48A,

§§ 217-218; A. 884). To avoid violation of law, United makes approved advertising material available to the agents. On the other hand, the name cards and the giving of promotional gifts are entirely within the control and are at the expense of the agents (Ex. R. 2; A. 1114). Agents are also free to process and pay policyholders' claims if they so wish. When an agent elects to make advance payment of claims, he is free to do so but at his own risk. Many agents do this, because it helps them to obtain and retain business (A. 277, 473-474, 516, 521-522, 703-704, 838-839, 846-850).

17. *Other Factors.* The rate manuals supplied to the agents are nothing more than "price list[s]". 304 F. 2d 86, 90. United's bare ownership of the agents' debit books is certainly without any significance in determining United's right to control the agents' manner and means of conducting their business. In brief, the "tools" of United's agents are "their own initiative and personality"; they still "work on their own time and at their own expense." 304 F. 2d 86, 90. The rate book merely sets forth certain prohibitions and regulations prescribed by state law; advises the agents of the types of risks which United will insure; and contains recommendations as to the selling and servicing of United's policies (Ex. GC 19; A. 92-93, 487-488, 893-894, 1068-1069).

* * *

In sum, United's debit agents are "on their own", using their own initiative and personality, to make as much, by way of commissions, as they can; they pay their own travel expenses, advertising, and gift expenses, rent, postage and telephone expenses, bond expenses, and the salary of any assistants (Ex. R. 2; A. 311-312, 410, 708-709, 866); they may take holidays when desired, without notice to United (A. 320, 427-428, 475-476, 709); they are not required to perform any function with regard to claims for

insurance benefits (A. 473-474, 516, 521-527, 703-704, 838-839); they may transfer policies with other agents but are not required by United to do so (A. 251, 255-256, 259-262, 307-308, 697-698, 715-718); they retain their own commissions from collected premiums, sending only the balance to United (A. 194-195, 696-697); and with respect to selling insurance, they are free to follow the assistant managers' suggestions or to devise their own means and methods (A. 460-461, 561-565).

United submits that the mere recital of these facts, without more, demonstrates the correctness of the Court of Appeals' conclusion that, under the "right of control" test, United's agents are independent contractors and not employes within the meaning of the Act. United has not reserved the right to direct and control the manner and means —the methods—by which its agents conduct their business. United is solely concerned with the results—the collections and sales—accomplished by its agents. "* * * [A]n employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee." **N. L. R. B. v. Steinberg**, 182 F. 2d 850, 856-857 (C. A. 5, 1950).

II.

THE COURT OF APPEALS PROPERLY EXERCISED ITS POWER OF JUDICIAL REVIEW IN SETTING ASIDE THE BOARD'S ORDER.

As indicated at the outset of our argument, pp. 12-13, *supra*, the Board's contentions as to the function of a reviewing court furnish no more than an alternative path to the Board's ultimate position that it must be left free to fix the status of United's agents. To make this argument in

terms of the reviewing power of a court, the Board reverts (Br., pp. 28-29) to the "* * * just and reasoned manner" test of **Gray v. Powell**, 314 U. S. 402, 411 (1941) and the "* * * warrant in the record and a reasonable basis in law" test of the **Hearst** case, *supra*, 322 U. S. at 131.

In **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474 (1951), this Court carefully analyzed the changes made in the review provision of the National Labor Relations Act by the Taft-Hartley Act, 29 U. S. C. § 160(e). After questioning whether it had ever been permissible for a reviewing court to apply the substantial evidence test solely on the basis of evidence which might support the administrative order, **Universal Camera** makes clear that the Congressional change in the review provision firmly established the importance of the court's function, a function to be carried out on an evaluation of all the evidence in the record. 340 U. S. at 487-488, 490.

The Board ignores the critical change in this whole area of law, resting its argument, as we have stated above, on cases which dealt with an earlier and entirely different standard of review. The Board's view is further demonstrated by the fact that in its statement of the case, the Board adverts only to the testimony which it believes supports its determination. If this case involved no more than a consideration of the opinion below in the light of the standard fixed by Taft-Hartley, we submit that the judgment of the court below should be affirmed. The decision of that court was plainly based on a consideration of the record as a whole.

But this case involves an added consideration of crucial importance. Here, the decisive test, the basis for the ultimate decision whether United's agents are employes or independent contractors, is a legal test drawn from the law of agency. There can be no question but that, in this cir-

cumstance, the court below was fully empowered to apply that test to the facts of the record and was not under a duty of deference to supposed administrative expert knowledge on the resolution of this ultimate issue.

A. The Evaluation of the Record as a Whole.

In the second **Pittsburgh Steamship Company** case,[21] this Court stated:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Comm'n v. American Tobacco Co., 274 U. S. 543, 544." (340 U. S. at 503).

Despite the contrary claim of the Board and the Union, it is clear that this case comes under the "usual rule" and does not present a question of principle "* * * the settle-

21. In **N. L. R. B. v. Pittsburgh Steamship Co.**, 340 U. S. 498 (1951), decided the same day as **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474 (1951), this Court affirmed the Court of Appeals' denial of enforcement of the Board's order under the "whole record" test. In the earlier case, **N. L. R. B. v. Pittsburgh Steamship Co.**, 337 U. S. 656 (1949), this Court reversed and remanded the case for a consideration of the effect of the "scope of review" amendment to the Taft-Hartley Act which became effective subsequent to the Board's order but prior to the Court of Appeals' decision.

ment of which is of importance to the public * * *"; nor is there "* * * a real and embarrassing conflict of opinion * * *" between the circuits. 340 U. S. at 502. It is evident that the Court of Appeals' decision in the present case affects only the debit agents involved in this case. The controlling principle of law requires that each case raising the issue of employe-or independent contractor status under the Act be decided on its own facts. While the results attained in the decisions of the courts of appeals, treating of this issue, necessarily vary according to the facts of each case, the courts of appeals have uniformly applied the "right of control" test in distinguishing between employes and independent contractors under the Act.

That the Court of Appeals properly apprehended the standard governing its review of the record in this case is clear (A. 1237):

> "Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. National Labor Relations Board,* 340 U. S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera* (340 U. S. p. 489) as affording '[s]ome scope for judicial discretion' and approved with the express realization that '[t]here are no talismanic words that can avoid the process of judgment', and the admonitions (340 U. S. pp. 488 and 496) that '[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight' and that the examiner's findings are not to be 'given more weight than in reason and in the light of judicial experience they deserve' and 'are to be considered along with the consistency and inherent probability of testimony'."

With this proper standard of review in mind, the Court of Appeals proceeded to examine the evidence on this record and determined that there was "* * * no support in the record for some of [the Board's] findings and but tenuous support for others. * * *" (A. 1239). The remaining factors relied upon by the Board were found to be entirely consistent with independent contractor status and were

> "* * * not indicative of an existence or exercise of control directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employes or who are independent contractors." (A. 1239).

In addition, the Court of Appeals found that the "* * * record * * * when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions." (A. 1243).

The Court of Appeals specifically addressed itself to principal factors relied upon by the Board. The Court of Appeals found a

> "* * * lack of evidentiary support for the examiner's findings that the Company pays travel expenses and furnishes rent, postage and telephone. * * * There is no payment of the agents' actual travel expenses. The record does not establish that the Company furnishes

> or reimburses the agent for postage. * * * With respect to 'rent', 'telephone' and the furnishing of 'office space' the record divulges only that during the three or four hours a week the agent spends in the district office of the Company, usually on the morning when he makes his weekly report and accounting, tables and chairs are made available in the district office which the agent may use while preparing his report. Likewise, the agent may occasionally use the Company telephone while he is in the district office or receive a telephoned message which has been left for him." (A. 1239).

The Board attached significance, for the purpose of differentiating between independent contractors and employes, to the matter of control over the transfer of policyholders from one agent to another and found that United controlled such transfers. Putting to one side any conflict of evidence on the point,[22] the Court of Appeals viewed this factor as "not of critical significance". The court pointed out: "Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such trans-

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22. See p. 24, *supra*. There was ample testimony that transfers of existing policyholders were freely made between agents without prior company approval. To the contrary was the testimony of the witness Scott. Scott testified as to those instances in the period following the execution of the reinsurance agreement in which transfers were prevented by the company. He could remember no other such instances and admitted making and receiving many transfers in the following period. Scott maintained that a report form on transfers had to be executed and approved by United in advance of the transfer, a position contrary to that of a number of other agents who testified and in conflict with the physical facts. Here, again, the Trial Examiner preferred Scott's testimony to that of all the other witnesses who testified on the subject.

fers and its need for knowledge of the same is readily apparent." (A. 1240). The court's position is obviously sound. A company, whether it operates through independent contractors or employes, must keep itself informed as to the areas in which its representatives are active, which representatives are handling its business in those areas, and the state of its business in such areas. Here, at least in the collection phase of the business, the areas were defined not by geographical lines but by the debit. Without information of the coverage of each debit, United would have been without adequate knowledge of the functioning of its business. Thus, whether that knowledge came before or after transfer, the information, critical to the efficient management of the business, had nothing to do with the status of the agents.

Concerning the assistance or supervision allegedly given to the agents by United, the Court of Appeals found that the evidence demonstrated that the small amount of assistance which did exist was not such that it entailed control of the manner and means as distinguished from the results to be achieved by the agents. "* * * The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case." (A. 1240-1241). Similarly, the Court of Appeals concluded that the varying testimony concerning the agents' attendance at "sales meetings" was "equivocal" and that because of "[t]he continuity of the relationship involved and the mutual interest of the parties in the result to be obtained * * *", attendance of the agents at such sales meetings

was not a significant factor in determining whether or not they were independent contractors (A. 1240-1241).

With respect to other factors relied upon by the Board, the Court of Appeals noted that: "* * * These factors embrace most of those mentioned in our opinion in the earlier case involving the Company's Pennsylvania debit agents (**United Insurance Company of America v. N. L. R. B.**, 7 Cir., 304 F. 2d 86). * * *" (A. 1238). Faced with the question of the status of United's agents for the third time within the past few years, the court below, understandably, felt no obligation to set out again in detail each of the factors discussed in a prior Opinion. The detailed discussion by the Court of Appeals with respect to such factors in the earlier case is equally applicable to, and supported by, the facts in the instant record (304 F. 2d at 90):[23]

> "* * * A debit agent is 'on his own.' He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. * * * [T]he agents pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. * * * An agent retains his own commission from collected premiums. As to selling insurance, the agent '* * * is free to follow the superintendent's suggestion or to devise his own methods.'
>
> "[The Examiner] considered significant that each agent was assigned to the staff of a particular superintendent, and that certain reports are made by the agents.
>
> "When United needs a new agent, he is given a debit within the territory of a particular office. To the

23. See pp. 23-24, *supra*.

extent permitted by insurance laws, an agent is free to choose any of these centers and usually selects one which is geographically convenient although other factors may be significant to him. But no agent may be transferred except at his own request, and he may sell and service policies anywhere in the state.

"* * * The reports mentioned by the examiner are no more significant than would be the situation where a manufacturer requires reports from its manufacturers' representative.

* * *

"The examiner relied upon the fact that rate manuals were owned by United. We think this is of no significance. Rate manuals in the insurance business are like a price list. A salesman must know the price of what he sells."

The Board and the Union, however, point to still other factors which they say are supported by substantial evidence on this record and sustain the Board's determination. The Union stresses (Br., p. 57) that the agents "* * * are not engaged in a distinct calling or business of their own, apart from the Company, * * *" and asserts that this factor alone should be decisive. But many route distributors, driver-salesmen, and vendors, who are independent contractors, are engaged in the businesses of their principals, and are not, for that reason, employes of their principals. Where, as here, agents work when they want and where they want, pay all their own business expenses, bear the risk of loss, are free to engage in additional occupations including the sale of the policies of other companies, and are compensated solely by commissions, the fact that they are engaged in the same business as their principal would seem to be of little moment.

The Board and the Union emphasize that United's agents rely upon their work as debit agents for their means of livelihood. But countless other independent vendors and solicitors also rely upon the commissions which they earn in their principal's business for their livelihood. The agents retain their commissions on collections and remit only net collections to United. The amount of the agents' commissions is determined solely by their industry and ambition in selling new business and collecting premiums on old. United sets the rates at which its insurance policies are sold but only in the sense that such rates must be submitted to, and approved by, the appropriate state agency. In any event, independent distributors frequently have the price of the items they sell set by their principal.

Nor is it practical to argue that encouraging continuity of an independent contractor relationship converts it into an employer-employe relationship. Seasoned men are obviously preferable to novices, whether they are independent contractors or employes, and it is axiomatic that companies which use independent contractors, all try to retain their experienced and successful ones as a matter of good business practice.

The Board and the Union argue (Bd. Br. pp. 23-24; Un. Br., p. 57) that "* * * [t]he occupation of debit agent is usually done under the direction of an employer in a relationship viewed by the law as employer-employee * * *", and they cite decisions of various courts and studies of the insurance industry so indicating. What the Board and the Union refuse to acknowledge, however, is that an insurance company such as United may effectively determine to operate its business on an independent contractor basis. Certainly, one of the traditional and fundamental rights of management is to decide for itself whether to perform its

functions through employes or independent contractors. Long ago, United made a conscious choice to conduct its business through independent contractors; this choice should not now be disturbed. As the court below put it in its earlier opinion (304 F. 2d 90-91):

> "* * * [S]ome insurance companies have established an employer-employee relationship such as the company in N. L. R. B. v. Phoenix Mutual Life Insurance Company, supra. [167 F. 2d 983 (C. A. 7, 1948)].
>
> "In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do."

Furthermore, while the Board and the Union cite (Bd. Br., p. 24; Un. Br., p. 58) various state court decisions holding that debit agents are, for one purpose or another, employes, they fail to mention the many other cases contained in the same annotation which hold debit agents to be independent contractors. See "Liability of Insurance Company for Negligent Operation of Automobile by Insurance Agent or Broker", 36 A. L. R. 2d 261-285 (1954). Similarly the Board and the Union cite **Capital Life and Health Insurance Company v. Bowers**, 186 F. 2d 943 (C. A. 4, 1951) without making any reference to **Zipser v. Ewing**, 197 F. 2d 728 (C. A. 2, 1952).[24] A reading of these Social Security Act cases demonstrates that **Zipser** is much closer factually to the present case than is **Bowers**. In **Zipser**, the Court of Appeals stated (197 F. 2d at 731):

> "* * * Insurance agents like Zipser are 'competent salesmen, almost entirely dependent upon their own

24. See also, **Sterns v. Clauson**, 122 F. Supp. 795 (D. Maine, S. D., 1954).

initiative, skill, and personality for success, working upon their own time, at their own expense, and deriving their remuneration from the results of their work.' As such they are not 'employees.' Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan, 8 Cir., 179 F. 2d 882, certiorari denied 340 U. S. 823, 71 S. Ct. 57, 95 L. Ed. 605, cf. United States v. Kane, 8 Cir., 171 F. 2d 54. The company did not, and under the agreement, could not have required the agent to work full time for it, canvass any particular territory, or, with any particular frequency, contact any particular prospect, use any particular sales technique, require regular reports, confine himself to selling a particular amount or kind of policy. Zipser did not even have a minimum quota to sell during the year. See Brady v. Periodical Publishers' Service Bureau, 6 Cir., 173 F. 2d 776; Benson v. Social Security Board, 10 Cir., 172 F. 2d 682; Party Cab Co. v. United States, 7 Cir., 172 F. 2d 87, 10 A. L. R. 2d 358; Broderick, Inc. v. Squire, 9 Cir., 163 F. 2d 980; McGowan v. Lazeroff, 2 Cir., 148 F. 2d 512. See also the state cases holding insurance agents to be independent contractors, not employees, *e.g.*, Northwestern Mutual Life Ins. Co. v. Tone, 125 Conn. 183, 4 A. 2d 640, 121 A. L. R. 993."

The Board and the Union make the curious argument that United's agents are employes because their work requires little or no skill (Bd. Br., p. 21; Un. Br., pp. 22-24). The weight to be accorded the degree of skill involved in passing on the question of independent contractor versus employe status is doubtful. It is a matter of common knowledge that some employes are highly skilled and some areas of independent activity require little or no skill. In any event, it is inaccurate to characterize United's agents as functioning in an area which requires no skill. They sell

various types of insurance and must be licensed by the state as to each type. They must be familiar with all aspects of different policies and be possessed of the knowledge necessary to advise potential customers. A new agent may require advice but his success will depend on the amount of skill he develops in sales techniques and in knowledge of his materials.

Contrary to the contention of the Board and the Union (Bd. Br., p. 21; Un. Br., pp. 62-63), United does not furnish its agents with the instrumentalities, tools, and place of their work. The agents do not work on United's premises. They spend no more than three or four hours a week in a district office (A. 1239). Their "place of work" is the home or wherever else they may choose, and the area in which they carry on their business. This area is not geographically restricted by United. The agents are free to solicit and obtain business anywhere subject only to various state insurance laws. The agents come and go as they please, and they may, at their own expense, hire any assistants they please. In no sense can United be said to restrict their business activities or to furnish the tools and place of their work. Moreover, in the last analysis, the tools of an agent are his own "* * * initiative and personality * * *." 304 F. 2d at 90.

The assistance which United furnishes the agents from time to time, in no way limits the freedom of the agents in the conduct of their business. The agent's reports of results are checked for accuracy; the agent's debit is serviced by an assistant manager, if available, when the agent is absent because of illness or for any other reason; and the agent's attendance at meetings for informal sales discussions is at his option and no action is taken if the agent chooses not to attend, although the benefit of the meetings is such that agents come if they can. The agents report

only the results of their efforts, not the days or hours worked or calls made, and even these reports of results are made only once per week. When an agent is experiencing a period of poor production, suggestions will be made as to how he may improve his production and earnings. But the agent is free to accept or reject any such suggestion. In short, United's agents are not supervised in the conduct of their business. They are only required to produce reasonable results and honestly report them. The methods used in obtaining those results are for the agent's ultimate determination.

The Union also points to the fact that United may terminate an agent when a review of the agent's reports reveals a serious shortage, some "wrongdoing", or an unusually poor production record for an extended period of time (Br., pp. 29-35). Under the "Agent's Commission Plan", the contract is terminable at will by either United or the agent. The Plan provides "that within ninety (90) days after termination, the Company will conduct an audit of [the] agency and settlement on such audit shall then promptly be made" (A. 1058). United's occasional exercise of this contractual right scarcely proves that United therefore possesses the right to control the manner and means by which the agents sell and service its policies.

The Union asserts (Br., p. 19) that the agents are employes because they do not possess title to United's policies and are not free to "alter, or discharge contracts, waive forfeitures, quote rates other than those published by the Company, [or] allow rebates* * *". Surely, to argue that these facts demonstrate employe status is to strain credulity. The simple fact of the matter is that the insurance industry is a highly regulated form of business. No insurance agent, not even the large independent insurance agency, possesses all the rights, which the Union

would have a United agent possess in order for him to be considered an independent contractor.

To summarize then, the Court below, in passing on the question of status of United's agents, examined all the facts of record, found that these facts supported United's position and that the arguments in favor of the Board's conclusion were "tenuous" at best. The care with which the Court below examined the record and reached the same conclusion on two occasions can be illustrated by comparing the outcome here with the result reached by the Court below in **N. L. R. B. v. Phoenix Mutual Life Ins. Co.**, 167 F. 2d 983 (C. A. 7, 1948), *cert. denied*, 335 U. S. 845 (1948). In **Phoenix**, the Court below held that the debit agents were, in fact, employes. To illustrate graphically the contrast between the facts here and in **Phoenix**, a chart has been prepared and is attached to this brief as Appendix A. The same chart also contrasts the facts here and those presented by the **Hearst** case. We submit that a reading of this comparative chart demonstrates the care with which the Court below examined the record, and the correctness of its decision.

Moreover, the Court of Appeals concluded that "* * * in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or equivocal nature of the factors embraced in other findings * * *", it was "* * * confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order.* * *" (A. 1243). The Trial Examiner's findings were based upon "* * * a credibility resolution that the General Counsel's chief witness, Ronney E. Scott, a former employee—debit agent of Quaker and the chairman of

the Union's local, whose display of evident 'partisonship' was recognized, 'was a reliable witness'.* * *'" (A. 1241). Further, the Examiner's appraisal of the testimony and his resulting findings were accompanied by and made in the context of his observation of alleged off-the-stand demeanor of other United agents (A. 1151-1152):

> "* * * [W]ithout exception the agents did not display or appear to have attributes of independence * * *, but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard. * * *
>
> * * *
>
> "* * * I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties."

The Court of Appeals determined (A. 1243) that "* * * resort to conclusions drawn from the application of such an elusive subjective standard as the examiner here puts forth is improper and that conclusions so drawn do not afford an acceptable basis for a credibility appraisal much less can they supply any independent evidentiary content. *Kovacs v. Szentes,* 130 Conn. 229, 33 A. 2d 124 [1943]."

To the Board's claim that any prejudice worked by the Examiner's resort to such off-the-stand demeanor was eradicated by the Board's subsequent disavowal of reliance thereon in affirming and adopting the Trial Examiner's findings, the Court of Appeals responded that it could "* * * not perceive how this disavowal [could] serve to remove from the examiner's findings and conclusions the

flavor with which his demeanor observation tainted them. *Cf. Wheeler v. N. L. R. B.*, D. C. Cir., 314 F. 2d 260, 263 [1963]; *N. L. R. B. v. American Federation of Television and Radio Artists*, 6 Cir., 285 F. 2d 902, 903 [1961] * * *" (A. 1243). The Court of Appeals added that its study of the record left it "* * * with a distinct impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner's credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the 'employee attitude' the examiner so tenuously surmised was reflected by debit agents' off-the-stand demeanor" (A. 1243).

While a Trial Examiner's credibility findings, arrived at in proper fashion, are ordinarily not subject to review by the Board or a court of appeals,[25] credibility findings based upon such elusive manifestations of human reactions as "obsequiousness" and "courtesy", to which the examiner applies his own view of what attitudes are "characteristic" of relationships between employers and employes and between independent contracting parties, are surely open to judicial scrutiny. Especially should this be true where, as here, such credibility findings not only pervade the examiner's findings of fact, but are also given independent force and meaning.

In **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. at 488-490, this Court stated that:

> "* * * The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.
>
> * * *

25. **N. L. R. B. v. Pittsburgh Steamship Co.**, 337 U. S. 656 (1949); **N. L. R. B. v. Walton Mfg. Co.**, 369 U. S. 404 (1962).

> "* * * [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.
>
> * * *
>
> "* * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

We submit that the Court of Appeals properly apprehended and applied these standards in its review of this record. Courts of Appeals in other Circuits have held, under circumstances comparable to those presented here, that the uncorroborated testimony of an interested witness —in this instance Scott the Union leader dedicated to proving employee rather than independent contractor status —is not always conclusive on the court.[26] Here, the Union admits (Brief, p. 41) that "* * * this particular record makes clear that the Quaker City agents, who had acted together as a Union before [United] took over, have continued to do so * * * [with] [a]gent Scott * * * as the collective spokesman * * *". Scott's motives were plain. Yet, despite the contradictory testimony of ten other agent witnesses, every aspect of Scott's testimony was blindly

26. See, *e.g.*, **N. L. R. B. v. Barberton Plastics Products Inc.**, 354 F. 2d 66, 69 (C. A. 6, 1965); **N. L. R. B. v. Mt. Vernon Telephone Corp.**, 352 F. 2d 977, 979 (C. A. 6, 1965); **Portable Electric Tools, Inc. v. N. L. R. B.**, 309 F. 2d 423, 426 (C. A. 7, 1962); **Farmers Co-operative Co. v. N. L. R. B.**, 208 F. 2d 296, 303 (C. A. 8, 1953); **Victor Products Corp. v. N. L. R. B.**, 208 F. 2d 834, 839 (C. A. D. C., 1953).

credited. "* * * [Where] an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement." **N. L. R. B. v. A. Sartorius & Co.**, 140 F. 2d 203, 205 (C. A. 2, 1944).

Here, the overall testimony of the witnesses—the solid sense of the record—failed to support the Examiner's preconceived findings. "The * * * findings of the examiner are to be considered along with the consistency and inherent probability of testimony.* * *" **Universal Camera Corp. v. N. L. R. B.**, *supra*, at 496. In addition, the Examiner's credibility resolutions were reached upon a highly suspect basis and made the backbone of an otherwise unfounded decision. The Trial Examiner's intuitive "hunch" that United's debit agents were employes because of their seeming "obsequiousness" and "courtesy" in their off-the-stand demeanor in the courtroom was no substitute for probative evidence. Such a "hunch" may "* * * mask the sheer determination to find in a certain way, and thus substitute the will of a man for the 'reason' of the law.* * *"[27] The Board's decision in this case was simply not "* * * justified by a fair estimate of the worth of the testimony of witnesses * * *". 340 U. S. at 490.

B. The Power to Draw the Ultimate Conclusion.

As we pointed out earlier in this brief, *supra*, pp. 34-36, the Board and the Union strenuously urge that a Board determination of employe status should not be disturbed on review, if it has "warrant in the record" and a "reasonable basis in law", because such a determination falls within the Board's sphere of expertise. We submit that the conclusion of employe or independent contractor status

27. Jaffe, Louis L., Judicial Control of Administrative Action (1965), p. 607.

under the Act can only be reached upon application of general agency principles, as Congress specifically directed, and that the application of these principles is not within the Board's expertise but, *per contra,* within the Court's.

We fully recognize the Board's general expertise in the field of labor relations. But if that expertise is to limit judicial review of the Board's conclusion in a particular case, it is respectfully suggested that the expertise must be relevant to the solution of the question at hand. In cases such as **Republic Aviation Corp. v. N. L. R. B.**, 324 U. S. 793 (1945) and **N. L. R. B. v. Seven-Up Bottling Co.**, 344 U. S. 344 (1953), the Board's expertise was properly invoked because of the overriding importance of labor relations policy considerations in those decisions and the absence of any limiting Congressional mandate. However, in a case like this one, where Congress has emphatically directed the Board to apply "the general principles of the law of agency", there is no occasion for deferring to the Board. The courts here possess the expert knowledge and ability, not the Board.

As Professor Jaffe put it[28]—"* * * Congress may itself quite clearly exclude the exercise of agency discretion with respect to all questions or with respect only to certain questions. Thus Congress' immediate response to *Hearst* was to enact an amendment to the Wagner Act that 'employee' would no longer cover those having the status of an 'independent contractor.' This speaks only in substantive terms; but since the reference is to a common-law concept, it would seem also to point to the judge as the one to make the decision."

The Board and the Union contend that, although Congress' amendment of the Act nullified this Court's substantive holding in **Hearst**, the "warrant in the record—reason-

28. Jaffe, *op. cit. supra,* p. 562.

able basis in law" standard for review enunciated in that case was not altered and remains the standard of review to be applied in cases of this type. As already noted, *supra*, p. 35, this argument completely ignores the general change in the scope of review of Board orders brought about by the Taft-Hartley amendment of Section 10(e) of the Act. Putting this to one side, the view also overlooks the Congressional substitution of agency principles for Board discretion in this area, a change which necessarily resulted in a significant change in the appropriate standard of review.

When an administrative agency uses common law concepts in arriving at its determination, the correctness of the agency's interpretation and application of those principles is ultimately for the courts to decide. This Court has always accorded to the courts of appeals greater freedom of review in such cases and has itself felt free to review such administrative determinations. Thus, in **S.E.C. v. Chenery Corp.**, 318 U.S. 80 (1943), the Securities and Exchange Commission had held that the managers of a corporate reorganization, who had bought shares of the corporation *pendente lite* in order to assure their participation in the reorganized corporation, had thereby breached the established common law obligations of fiduciaries. On appeal from the S.E.C.'s disapproval of the reorganization plan, this Court, asserting its prime competence to develop and to declare the common law, remanded the case to the S.E.C. for further consideration, on the ground that it could find no breach of fiduciary obligations under existing judicial precedent.

Several years later, in the case of **Texas Gas Transmission Corp. v. Shell Oil Co.**, 363 U.S. 263 (1960), wherein the Federal Power Commission had reached its determination upon an application of ordinary rules of contract construction, this Court stated (at p. 270):

> "* * * since the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles. See *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 91."[29]

Two court of appeals' decisions illustrative of this principle are **S.E.C. v. Cogan**, 201 F.2d 78 (C.A. 9, 1952), and **In Re Engineers Public Service Co.**, 221 F.2d 708 (C.A. 3, 1955). Both of these cases involved the question whether attorneys were properly denied counsel fees by the S.E.C. on the ground that they had not adhered to the requisite standard of fiduciary conduct. In **Cogan**, the Ninth Circuit at first affirmed the S.E.C.'s denial of fees, but on rehearing reversed the Commission, stating (201 F.2d at 86):

> "* * * The able and learned district judge was, we think, as well qualified to pass upon what are the proper standards of professional conduct, and to arrive at appropriate conclusions as to Cogan's act, as

29. In the **Texas Gas** case, the petitioners unsuccessfully advanced the identical argument as to the scope of judicial review which is here urged by the Board and the Union. There, it was urged that the Court of Appeals had "* * * exceeded the allowable limits of judicial review * * *" on the theory that the Court was bound by the "* * * expert knowledge and judgment * * *" of the Federal Power Commission on the issue involved. 363 U. S. at 268. Petitioners urged that the court was bound to accept the Commission's view if that view had "* * * warrant in the record and a reasonable basis in law * * *". *Id.* This Court pointed out that the question before both the Commission and the Court involved the application of rules of contract construction, not the use of any specialized knowledge or experience on the part of the Commission, and that there was no warrant for imposing the restrictive rule as to the scope of review urged by petitioners. 363 at 268-269, 270.

was the Commission. If any 'expertise' was involved, it belonged to the district judge because of his familiarity with the ancient standards of proper fiduciary conduct as long established in the courts of equity. * * * And so, just as in the first Chenery case the Supreme Court because of its superior knowledge of the principles established by courts of equity, rejected what the commission said of those principles, so here we think it manifest that the district judge knew more about the subject in hand than did the Commission. * * *"

In **In Re Engineers**, Chief Judge Biggs reiterated what was said in **Chenery** and **Cogan** (221 F.2d at 712):

"* * * The issue does not require the type of judgment which administrative agencies are best equipped to make. We are of the opinion that the District Court here was as well qualified as the Commission—if not better qualified—to determine whether the appellees should be compensated for their services, so that no particular deference is due the administrative judgment. See Davis, Administrative Law 927. * * * We, therefore, shall review the standards applied by the Commission in this case without that exacting deference that is due to the determination of experts."

The Court thereupon reversed the Commission.[30]

An examination of the cases in which the several courts of appeals have considered the substantive issue presented here, *i.e.*, employe versus independent contractor status, under the Act, discloses that they have exercised a high degree of independent judgment in passing upon the correctness of the Board's ultimate conclusion. The courts of

30. See also, **James S. Rivers, Inc. (WJAZ) v. Federal Communications Commission**, 351 F. 2d 194, 198 (C. A. D. C. 1965) (Bazelon, C. J., concurring).

appeals have consistently, and quite aside from the Board's determination, closely scrutinized the records before them and, upon their own analysis of the facts, arrived at their own conclusions as to whether the status of the persons involved was that of employe or of independent contractor. Thus, the decisions of the courts of appeals in this area more often than not speak in terms of "we feel", "we think", "in our opinion", "in our view", etc.[31]—unmistakable hallmarks of the exercise of independent judgment. The courts of appeals constantly refer to the legislative history of the 1947 amendments and the directive that common law concepts be applied, and speak of "the critical question before us", and state that the "court * * * must determine [the] issue".[32] Manifestly, the Courts of Appeals keep a tighter rein on the Board in these cases than in others. United submits that this is entirely appropriate and wholly in keeping with the legislative history of the independent contractor exception.

The Board argues (Bd. Br. p. 19), as does the Union in the same vein, that "* * * problems of definition of status * * * are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole' * * *", **Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko**, 373 U.S. 701, 706 (1963), and

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31. See, *e.g.*, **Frito-Lay, Inc. v. N. L. R. B.**, 66 LRRM 2542 (C. A. 7, 1967); **Site Oil Co. of Missouri v. N. L. R. B.**, 319 F. 2d 86 (C. A. 8, 1963); **N. L. R. B. v. Servette, Inc.**, 313 F. 2d 67 (C. A. 9, 1962).

32. See, *e.g.*, **National Van Lines, Inc. v. N. L. R. B.**, 273 F. 2d 402 (C. A. 7, 1960); **N. L. R. B. v. Phoenix Mutual Life Ins. Co.**, 167 F. 2d 983 (C. A. 7, 1948); *cert. denied*, 335 U. S. 845; **Minnesota Milk Co. v. N. L. R. B.**, 314 F. 2d 761 (C. A. 8, 1963); **N. L. R. B. v. Keystone Floors, Inc.**, 306 F. 2d 560 (C. A. 3, 1962); **N. L. R. B. v. Norma Mining Corp.**, 206 F. 2d 38 (C. A. 4, 1953); **N. L. R. B. v. Steinberg**, 182 F. 2d 850 (C. A. 5, 1950).

refers this Court to cases interpreting the term "supervisor" as it is contained in Section 2(11) of the Act.[33] These cases are readily distinguishable from the present case on two grounds: (1) the term "supervisor" is not a common law term, and (2) Congress has not ordained that the term "supervisor" be interpreted by reference to any particular body of concepts. The term "supervisor" is, in this respect, more like the term "crew" as contained in the Longshoremen's and Harbor Workers Compensation Act[34] and defined by this Court: "The word 'crew' does not have an absolutely unvarying legal significance.* * * It must be defined 'in the light of the mischief to be corrected' ". **South Chicago Coal & Dock Co. v. Bassett**, 309 U.S. 251, 258-259 (1940).[35] Conversely, the terms "employee" and "independent contractor", as used in the Labor Act, are to be defined not so much "in the light of the mischief to be corrected" as in accordance with common law principles of agency law.[36]

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33. **Journeymen Plasterers' Protective and Benevolent Society of Chicago v. N. L. R. B.**, 341 F. 2d 539, 545 (C. A. 7, 1965); **N. L. R. B. v. Swift and Company**, 292 F. 2d 561, 563-564 (C. A. 1, 1961).

34. 33 U. S. C. §§ 901-950.

35. See also, **N. L. R. B. v. Coca Cola Bottling Co.**, 350 U. S. 264 (1955) and **N. L. R. B. v. Highland Park Manufacturing Co.**, 341 U. S. 322 (1951), in which this Court construed the statutory terms "officers" and "labor organization" in accordance with the ordinary layman's understanding of those terms—"the speech of people"—since the legislative history of the Act provided no guide for definition. Here, of course, the legislative history of the Act indicates that the terms "employee" and "independent contractor" are to be interpreted in accordance with "the general principles of the law of agency".

36. This Court's decision in **Office Employes International Union, Local No. 11, AFL-CIO v. N. L. R. B.**, 353 U. S. 313 (1957), should also be noted. There, the Board had refused to assert jurisdiction over labor unions as a class, when acting as "employers", despite Congress' clear intent to the contrary. This Court, citing the legislative history, held that "* * * the Board erred when it refused to take jurisdiction and thus, in effect,

As noted *supra,* at p. 18, the term "employee" is also to be defined by reference to common law concepts under the Social Security Act. In reviewing determinations of employe status under that Act, the courts of appeals have likewise, when the occasion warranted, exercised independent judgment and not abdicated to the administrator's determination. See, *e.g.,* **Saiki v. United States,** 306 F.2d 642 (C.A. 8, 1962); **Cody v. Ribicoff,** 289 F.2d 394 (C.A. 8, 1961); **Benson v. Social Security Board,** 172 F.2d 682 (C.A. 10, 1949); **Ewing v. Vaughan,** 169 F.2d 837 (C.A. 4, 1948); **Carroll v. Social Security Board,** 128 F.2d 876 (C.A. 7, 1942). But see **Delno v. Celebrezze,** 347 F.2d 159 (C.A. 9, 1965):

In short, while the Board may have expertise in interpreting particular statutory terms, Congress has made clear its intention that the terms "employee" and "independent contractor" are to be interpreted "under the general principles of the law of agency"—a task for which the Board possesses no special competence. Experienced in the resolution of common law questions, the court below correctly, and in complete accord with the decisions of the

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engrafted a blanket exemption upon the Act for all labor unions as employers. * * *" 353 U. S. at 315. Here, the Board's assertion of jurisdiction over debit agents, as a class, despite Congress' contrary intention that the Act's coverage extends only to "employees" as distinguished from "independent contractors" under common law standards, should be rejected as an attempt by the Board to engraft upon the Act blanket coverage over debit and similar insurance agents. The Board's obstinate adherence to its view as to blanket coverage of debit agents is perfectly illustrated by the history of its treatment of United. We have already adverted to the fact that the court below has been twice called upon to rule on this status issue. See page 4, *supra.* The first and earliest case before that court which involved United's debit agents raised a revealing issue of due process, namely the refusal of the Board to permit United to adduce any testimony as to the nature of its operation which bore on the question of the status of its agents. 272 F. 2d 446 (C. A. 7, 1959).

Court, brought its knowledge and insight to bear upon its examination and evaluation of the evidence on this record. The significance and relevance of the various factors cited by the Board were carefully appraised in the light of the appropriate legal standards. The Court of Appeals thereupon determined that, cast in this light, some of these factors were "not of critical significance", while others were "equivocal", or "consistent with an independent contractor status". Since the characterization of facts as significant or insignificant, relevant or irrelevant, is not the finding of facts, but rather the application of legal standards to facts already found, these determinations were plainly made within the Court of Appeals' proper scope of review.

III.

THE BOARD ERRED IN ORDERING UNITED TO BARGAIN WITH A UNION PURPORTING TO REPRESENT A UNIT WHICH, AT THE WORST, WAS HALF EMPLOYE AND HALF INDEPENDENT CONTRACTOR.

At the time of the events testified to in this case, the Board's witness Scott, a former Quaker agent, reported to United's Franklin Street office in Baltimore, a former Quaker location, which had been taken over by United in March, 1964 when its reinsurance agreement with Quaker became effective (A. 200, 354).[37] The ten agents who testified on behalf of United in this case, and who had sold and serviced United's policies in Baltimore prior to the United-Quaker reinsurance agreement, reported to United's St. Paul Street office in Baltimore which had long been, and still is, a United district office (A. 694, 755, 831, 875). Scott's knowledge of the manner in which United conducts its business was therefore plainly restricted to the Frank-

37. This former Quaker office was discontinued as a reporting center by United in September, 1965.

lin Street office; he did not even pretend to have any knowledge of the manner in which United conducts its business in any other district in Baltimore City or Anne Arundel County, Maryland.

Thus, even if the Board could have concluded, on the basis of Scott's testimony, that control was exercised over the former Quaker agents, all of whom reported to the Franklin Street, Baltimore office, the uncontradicted testimony of the ten United agents, who reported to the St. Paul Street, Baltimore location, required the Board to find that the agents who reported to the latter office were truly independent contractors.

The Trial Examiner, who relied entirely on Franklin Street testimony, was plainly wrong in his assumption that an exercise of control at one location demonstrated a right of control at every other location. Moreover, in finding that United exercised control over the former Quaker agents, the Examiner completely discounted the turmoil which existed in United's Baltimore district offices during the months following the United-Quaker reinsurance agreement. The Examiner stated, without witness or authority, that the transitional period lasted through the month of March, 1964 (A. 1158). Since the reinsurance agreement became effective March 16, 1964, this meant that, in the Examiner's opinion, the transitional period consumed only two weeks. Yet, Scott, in his testimony, plainly conceded that the changeover was still going on as late as September, 1964 (Ex. GC 38; A. 1104-1106). It will be remembered that the hearings in this case were held in December, 1964.

William Formwalt, a former Quaker agent and district manager, and thereafter a United district manager and division manager, testified that the objective of United was to put the former Quaker agents "on their own" (A. 498), but that these agents "resented or resisted the change, and

• • • wanted to stay status quo" (A. 503), *i.e.*, they wanted to remain employes, as they had been as Quaker agents. To this end, Scott, as a former Quaker agent and chairman of the Union local, attempted to create as many indicia of employe status as possible in the relationship between United and the former Quaker agents. To whatever extent Scott succeeded in this endeavor, he, as the spokesman for the former Quaker agents, frustrated United's clear objective to operate its business on a uniform independent contractor basis.

Clearly, however, Scott's activities were limited to the Franklin Street, Baltimore office. The ten old line United agents who reported to the St. Paul Street, Baltimore office testified, without contradiction, that they operated "on their own", wherever, whenever and however they pleased. Their testimony was no different than was the testimony adduced from United's Pennsylvania debit agents in the earlier case (304 F. 2d 86). Accordingly, even if the Board could have concluded that the former Quaker agents remained employes after becoming United agents, and despite their signing of independent agency agreements, this record required the Board to find that the remaining agents involved in this case were independent contractors. In this circumstance, the Board was without power to order United to bargain with respect to its agents at the St. Paul Street office, approximately one-half of the total involved, who, according to all of the testimony in the record, are clearly independent contractors.[38] There is no contrary testimony. Under the Labor Act, no employer can be compelled to bargain with respect to a unit which includes independent contractors, let alone one which, at worst, is half employe and half independent contractor.

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38. As noted, p. 5, *supra*, one hundred fifty-nine agents were ruled eligible to vote in the certification election held in August, 1964. Eighty of these agents were old line United agents; seventy-nine of these agents were former Quaker agents (A. 339).

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: December 27, 1967.

APPENDIX A.

Factual Analysis and Comparison of United's Independent Agency System With Systems Used in N. L. R. B. v. Phoenix Mutual Life Insurance Co., 167 F. 2d 983 (C. A. 7, 1948), Cert. Denied 335 U. S. 845, and N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111 (1944).

Factor	*United*
1. Furnishing of facilities and services.	United's agents are not permitted to use the district offices for the general conduct of their business; United does not provide its agents with "rent", "telephone", "office space", postage, or business cards; United's agents pay all their own business expenses; United furnishes its agents only business forms and some advertising materials.
2. Control over the details of the agents' operations.	United's agents are "on their own", free to conduct their business whenever, wherever and however they desire.

Phoenix	*Hearst*
Phoenix provided its agents with a headquarters and furnished its agents with office space, desks, telephones, stenographic service, stationery, postage, filing cabinets, sales supplies, business cards, advertising specialties and other materials.	Hearst furnished its newsboys with boxes, racks, money change aprons and placards advertising special features contained in the papers; the equipment was distributed without charge to the newsboys but with instructions as to its use.
Phoenix kept close check on the details of its salesmen's work and exercised a large measure of control over them.	The newsboys were required to be at their posts from the time the papers customarily appeared on the street to the time settlement was made; the diligence of the newsboys was closely observed by the circulation department; the district managers instructed the newsboys how to hold, display and call the newspapers; Hearst exercised supervision over the conduct of the

Factor	*United*
3. Assigned territories.	The debits serviced by United's agents frequently overlap; the agents are free to solicit and obtain new business anywhere, subject only to the various states' insurance laws; the agents are free to transfer policies among themselves, but may not assign their contracts.
4. Full-time job.	United's agents are free to engage in additional occupations including the sale of competing companies' policies.
5. Hiring of assistants.	United's agents are free to hire assistants, if they wish, to aid them in the servicing of their debit.
6. Risk of loss.	United's agents bear all risk of loss including "hold-up" shortages and unpaid premiums on lapsed policies.

Phoenix	*Hearst*
	newsboys while they were engaged in selling newspapers on the street.
Territories were assigned to the agents; policies could not be transferred between the agents without company approval, and contracts could not be assigned.	The district manager allocated the street corners in his district and removed, permanently or temporarily, newsboys from their corners or transferred them from one location to another; on occasion, the newboys bought and sold corners without the publisher's knowledge or express approval.
Phoenix required its agents to devote full time to its business and its agents were not permitted to sell competing companies' policies.	The newsboys sold several newspapers and handled magazines although in some instances the publishers objected to their handling competing publications.
Phoenix did not permit its agents to hire anyone to assist them in their work.	Many of the newsboys hired others at will to help them sell newspapers in their assigned locations.
Phoenix paid for its agents' indemnity bonds.	The newsboys were required to account for all papers not returned and not sold; the burden of loss without fault fell upon the newsboys.

Factor	*United*
7. Compensation.	United's debit agents work strictly on a commission basis with no salary, advance or draw; the rates for its policies are set by United but must be submitted to and approved by the state insurance department; thereafter, the rates cannot be changed without state approval.
8. Reports.	United's agents file only weekly reports of the results of their operations *i.e.*, collections made and policies sold; at no time do they in any manner report the hours worked or the interviews held.
9. Performance.	United's agents are required only to produce reasonable results.

Phoenix	*Hearst*
During the first two years of their service, Phoenix's agents could operate under a financing contract, which included advance draws, rather than a regular commission contract, the rates for Phoenix' policies were similarly set and approved.	The newsboys' compensation was the difference between the wholesale and retail prices of the papers; both these prices were fixed by the publishers.
Phoenix's salesmen were required to furnish management with daily records of daily interviews and sales, the number of hours worked in the field, the number of interviews had, and the number of new prospects interviewed for each day of the week.	Daily settlements were held.
Phoenix required its agents to produce a specified minimum of new business each year.	The district managers determined the number of papers in excess of the newsboys' established orders which they had to sell; the newsboys could not determine the size of their established orders without the cooperation of the district managers.

Factor	*United*
10. Establishment and permanency of relationship.	United's agents are engaged, under written contract, following application and interview; no experience is necessary; little or no training is offered the agents; the agents are encouraged to continue their relationship with United as seasoned men are obviously better than novices; United does not pay unemployment compensation or provide workmen's compensation but does permit agents to participate in group insurance and pension plans, to which United and the agent contribute equally, on a strictly voluntary basis, and makes Social Security Act payments on behalf of the agents in accordance with Section 3121(d)(3)(b) of that Act.

Phoenix	*Hearst*
Phoenix selected its agents upon written application and after personal interview; its agents executed an agency contract; no experience was required; Phoenix conducted an intensive training program for its agents; only after completing the training period were the agents permitted to take field trips; during their first interviews they were usually accompanied by a supervisor; Phoenix encouraged its agents to remain permanently with it; Phoenix provided its agents with a noncontributory pension plan and also made available a disability plan.	Hearst did not provide its newsboys with workmen's compensation coverage or make payments under the Social Security Act on their behalf. Other items mentioned under this heading, in the cases of United and Phoenix, do not appear in the case of Hearst.